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Congressional Committees - Contempt Powers

Irvin J. Friedland

CONGRESSIONAL COMMITTEES—CONTEMPT POWERS

I. INTRODUCTION

Two relatively recent cases decided by the Supreme Court have attempted to lay down rules which will safeguard witnesses brought before Congressional Committees. The more recent of the two cases, *Barenblatt v. United States*,[1] required an interpretation of the rules laid down in the earlier one, *Watkins v. United States*.[2] This article will attempt to show that the *Barenblatt* case did not follow the principles set down in the *Watkins* decision. As it did not specifically overrule *Watkins* it is submitted that it leaves the state of the law in the area of contempt powers of Congressional Committees more confused than ever.

Even if the *Barenblatt* decision had been consistent with the *Watkins* case, the main problems of witnesses appearing before the Committees would not be solved. Therefore, after comparing the factual situation of the *Barenblatt* case with the rules set down in *Watkins*, this author will give his opinion as to what those problems are, and a possible solution to them.

II. FACTS OF BARENBLATT CASE

On June 4, 1954, Lloyd Barenblatt was served with a subpoena to appear before the House Subcommittee on Un-American Activities.[3] He appeared before the Committee on June 28, 1954, being the last of five witnesses who testified that day.

The first witness to testify that day was Francis Crowley. Crowley was appearing voluntarily as he now had a desire to tell his entire story which he had refused to tell the Committee when he was called before them previously. Crowley stated that he had attended the University of Michigan from 1947-1950, and during ths time he was a member of the Communist Party. He named many individuals at the University of Michigan whom he believed to be Communists or associated with similar groups. One of the groups he mentioned was the Haldane Club which he described as being "chiefly of an intellectual nature discussing things."[4] It consisted of 8 or 10 instructors. Among those Crowley named were Robert Silk, Norman Cayden, Lloyd Barenblatt, and Lester Beberfall.[5] Crowley identified Barenblatt as a member of the Haldane Club and the Communist Party, but added that Barenblatt was no longer a member.[6]

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[1] Barenblatt v. United States, 79 Sup. Ct. .1081 (1959).
[2] Watkins v. United States, 354 U.S. 178 (1957).
[3] The Subcommittee hereinafter will be referred to as the Committee.
[4] Record, p. 204, Barenblatt v. United States, 79 Sup. Ct. .1081 (1959).
[5] Record, p. 210-211.
[6] Record, p. 210.

Barenblatt, an instructor at Vassar College, supplied the Committee with information on his educational background, but when he was asked about being a member of the Communist Party at Michigan he indicated he wished to object to the question. The Chairman then told him to answer the question before objecting.[7] The question then propounded followed: "Are you now a member of the Communist Party?" Barenblatt asked to read his objections, and after some discussion they were admitted into evidence, but not read aloud.

Subsequently, four further questions were asked of Barenblatt,[9] which he refused to answer on the basis of the objections already admitted into evidence. The Committee then mentioned their duty under their authorizing resolution to concern themselves with "several active bills dealing" with subversive activities, but never stated any further details as to what these bills dealt with.[10] The Committee then excused Barenblatt and adjourned. On July 23, 1954, he was cited for contempt by the House of Representatives.[11]

III. Pertinency of the Questions Under Inquiry

Barenblatt was tried for contempt of Congress, convicted, and sentenced under 2 U.S.C. 192 (1952) which states, *inter alia,* that it is a crime to appear before a congressional committee and refuse to "answer any question pertinent to the question under inquiry." Prior decisions had interpreted rights of defendants under 192. When Congress, by this statute, seeks to enforce its power through the criminal process administered by the federal judiciary the defendant has the same rights that are secured by the Courts to defendants in other criminal actions.[12] One of these rights is to know, in advance, with sufficient clarity that he may be violating a criminal statute.[13] To know in advance if he is violating 192 the witness must be able to determine if the questions are "pertinent to the question under inquiry." Pertinency becomes one of the elements of the crime and must be proved beyond a reasonable doubt. The need for a clear understanding of what is under inquiry becomes all the more necessary because the

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[7] Record, p. 222.
[8] Record, p. 227.
[9] The questions were:
"Have you ever been a member of the Communist Party?"
"Now you have said that you knew Francis Crowley. Did you know Francis Crowley as a member of the Communist Party?"
"Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan?"
"Were you a member while a student of the University of Michigan Council of Arts, Sciences and Professions?"
[10] Record, p. 240.
[11] Record, p. 69.
[12] Sacher v. United States, 356 U.S. 576 (1958).
[13] United States v. Cardiff, 344 U.S. 174 (1952); United States v. Cohen Grocery Co. 255 U.S. 81 (1921).

witness is not exonerated by a good faith error on his determination of the pertinency of the question.

The *Watkins* case laid down the duty of the Committee to specifically tell the witness the purpose of his being questioned.[14] The *Barenblatt* decision does not deny this but feels, under the facts, that the witness was so informed.[15]

It seems to this author, that the factual conclusions made in *Barenblatt* can be challenged. The majority opinion of the Supreme Court mentions Barenblatt's failure to raise the objection of pertinency when he appeared before the Committee.[16] If the Court[17] is suggesting that he thereby waived the objection, the answer is that it cannot be waived.

> . . . the right to refuse to answer a question which is not pertinent is not a personal privilege, such as the right to refrain from self-incrimination, which is waived if not reasonably asserted.[18]

Or the Court may mean that because Barenblatt did not raise the issue of pertinency before the Committee, he was in no doubt concerning the question under inquiry. Both viewpoints seem unreasonable. Barenblatt objected to the jurisdiction of the Committee and the deprivation of his constitutional rights. If he was correct, there was no need to make further objections as the ones already made were sufficient. He did not object to the pertinency of the questions as he felt the Committee had no power to ask him any questions regardless of the pertinency.

The opinion in *Watkins* clearly describes five criteria by which the pertinence of a question can be made clear to a witness: (1) the authorizing resolution, (2) the opening remarks of the chairman, members, or counsel of the Committees, (3) the nature of the proceedings, (4) the questions themselves, and (5) the chairman's response to an objection on pertinency.[19]

The first yardstick the witness may use to determine the "question under inquiry" is to scrutinize the authorizing resolution of the Committee. This reveals this verbage:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of Un-American propaganda activities in the United States, (2) the diffusion

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[14] Watkins v. United States, *supra,* note 2 at 214.

[15] Barenblatt v. United States, *supra,* note 1 at 1091, 1092.

[16] *Ibid.*

[17] The Supreme Court will hereinafter be referred to as the Court.

[18] Bowers v. United States, 202 F. 2d 477, 482 (D.C. Cir. 1953). Accord. Christoffel v. United States, 338 U.S. 84 (1949).

[19] Watkins v. United States, 354 U.S. 178, at 180-209 (1957).

> within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.[20]

One need only read the authorizing resolution to see how uncertain a course it charts for the Committee. It is so vague that the Government in *Watkins* conceded that it could be of no help in determining the pertinency of questions asked of a witness.[21] Any possibility that the resolution could serve in this case as a guide to pertinency of questions was disposed of by the comment of the Court that, "It would be difficult to imagine a less explicit authorizing resolution."[22]

Another means by which the pertinency of questions can be disclosed is the nature of the proceedings. All the witnesses who appeared prior to Barenblatt had at one time been at the University of Michigan, and had the questions been confined to the University and to education the subject under inquiry might have been clear. Instead, this connection with the University of Michigan was used as an initial jumping off point to probe into their service records, their attitudes and beliefs regarding the Committee, their non-subversive political associations, and other activities.[23] From the maze of topics covered in the proceedings, Barenblatt could only guess as to the pertinency of questions that might be put to him. The nature of the proceedings did not avoid this "vice of vagueness."[24]

Another source of evidence as to the "question under inquiry" is the questions themselves. Barenblatt refused to answer five questions.[25] Surely the first few questions asking him if he was or is now a Communist, would be of little help in discovering what subject the Committee was investigating. If Barenblatt had to use the rest of the questions themselves as a guide, he would be put in the position of having to ascertain the nature of the inquiry from a hurried deduction of what he believes to be the purpose of the questions. To make such a demand of the witness seems contrary to the rationale upon which *Watkins* is based. The affirmative obligation is on the Committee to clarify the nature of the inquiry. It is not on the witness.

A further standard the Court looks to is the Chairman's response when the witness objects on the ground of pertinency. The Supreme

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[20] H.R. Res. No. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 15, 18, (1953).
[21] Watkins v. United States, *supra,* note 19, at 209.
[22] *Id.* at 202.
[23] Hearings Before the Committee on Un-American Activities, House of Representatives, June 28 and 29, 83d Cong., 2d Sess., 5755-5801 (1954).
[24] United States v. Josephson, 165 F. 2d 82, 88 (2d Cir. 1947).
[25] See footnote 9.

Court points out that Barenblatt did not pose an objection on the grounds of pertinency.[26] Any such objection before this Committee would probably not have elicited any clarification of the nature of the inquiry. This becomes apparent when it is noted that at first the Committee refused to listen to Barenblatt's objections.[27] The Committee then used the rather unorthodox procedure of demanding an answer *before* hearing the objection. Little was to be gained by having pertinency explained *after* he answered.[28] Finally the Committee admitted Barenblatt's objections into evidence,[29] but every time he used the objections as grounds for refusing to answer, the Chairman ordered him to answer despite the fact that he had no knowledge of what the objections contained.[30] Barenblatt's lack of objecting on the grounds of pertinency under these circumstances cannot lead to the conclusion that he was in no doubt as to the question under inquiry.

The last standard the Court looks to is the opening remarks of the Chairman or Counsel. The Court, in the *Barenblatt* case, felt that the opening remarks were sufficient to disclose the "question under inquiry."[31] The opening remarks were more illuminating than any of the other four criteria,[32] but the decision presumes that this background knowledge was heard by Barenblatt, without any showing that such was the case. No "presumption of pertinency" will suffice,[33] and it must be proved "beyond a reasonable doubt."[34] Therefore it would seem that the opening remarks should either be heard personally or repeated to the witness before he can be held liable for their content.

IV. The Authorizing Resolution of the House Committee on Un-American Activities

The *Watkins* decision, in addition to setting the standards of pertinency seemed to invalidate the authorizing resolution of the Committee. The resolution was found to be so vague that it was impossible to determine what subjects were within the scope of the Committee's jurisdiction, and therefore the Committee could never be acting within its proper limits.

It is well settled that compulsory process cannot be used to convict witnesses for refusing to answer questions which Congress has not

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[26] Barenblatt v. United States, 79 Sup. Ct. 1081, at 1091 (1959).
[27] Record, p. 223.
[28] "Mr. Barenblatt. But, sir, I believe I have a right to state my objections to the question. That is all I am doing."
"Mr. Velde. You will be given that right if you will answer the question in the affirmative or the negative." Record, p. 223.
[29] Record, p. 227.
[30] Record. p. 238.
[31] Barenblatt v. United States, *supra*, note 26 at 1092.
[32] For opening remarks, see: *Id.* at 1095.
[33] Bowers v. United States, 202 F. 2d 447, 448 (D.C. Cir. 1953).
[34] Quinn v. United States, 349 U.S. 155, 165 (1955).

given the Committee authority to ask.[35] This proposition was accepted and reiterated in *Watkins* in the statement that "these committees are restricted to the missions delegated to them . . ." and that "no witness can be compelled to make disclosures on matters outside that area."[36] The only source for the Committee's jurisdiction that has been delegated to it by Congress is its authorizing resolution.

In trying to assess the jurisdiction of this Committee from its authorization the Court has said:

> Combining the language of the resolution with the construction it has been given, it is evident that the preliminary control of the Committee exercised by the House of Representatives is slight or non-existent. *No one could reasonably deduct from the charter the kind of investigation that the Committee was directed to make.*[37] (Emphasis added.)

The Court went on to declare that the Committee was allowed to "define its own authority," and it almost had to be this way as of necessity because the jurisdictional boundaries set by the House of Representatives were so "nebulous."[38] The Court indicated that they found it impossible to judge what the resolution was aimed at as the original draftsmen had never made this judgment.[39] From the immediately preceding philosophy it appeared settled that the authorizing resolution of the House Committee on Un-American Activities is so uncertain as to make impossible any determination of Committee jurisdiction.[40]

Since no one can be compelled to testify outside the delegated area, and the delegated area of this Committee is unascertainable, it seemed to follow that the Government can never carry the burden of proof in showing that any subject was delegated to this Committee.[41]

These conclusions are disturbed by the majority opinion in *Barenblatt* that there were two reasons that militated against interpreting *Watkins* as striking down the Committee's authorizing resolution. It was asserted that: (1) if the Supreme Court had held this they would have used more specific language; (2) if they had done this there would have been no further discussion.

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[35] United States v. Rumely, 345 U.S. 41 (1953); United States v. Orman, 207 F. 2d 148 (3d Cir. 1953); United States v. Kamin, 136 F. Supp. 791, 804 (D.C. Mass. 1956).

[36] Watkins v. United States, *supra,* note 19 at 206.

[37] *Id.* at 203, 204.

[38] *Id.* at 205.

[39] *Id.* at 206.

[40] The scope of the delegated power in the charter must be even more clearly revealed when First Amendment rights are threatened. United States v. Rumely, 345 U.S. 41 (1953).

[41] "The burden of proof" in showing if the Subcommittee was authorized to conduct this particular inquiry "is in the government." United States v. Kamin, 136 F. Supp. 791, 792 (D.C. Mass. 1956).

The argument that the Supreme Court would have used more specific language if they desired such a result, does not seem consistent in light of the strong language used in *Watkins*. The conclusion reached in *Watkins* would seem to be more than explicit as illustrated by the quotations from *Watkins* set out earlier in this article. The dissenters in the *Barenblatt* case found the *Watkins* language explicit enough to compel interpreting the decision as striking down the authorizing resolution:

> Measured by the foregoing standards, Rule XI cannot support any conviction for refusal to testify. . . . I think it clear that the boundaries of the Committee are, to say the least, 'nebulous' indeed, 'it would be difficult to imagine a less explicit authorizing resolution.'[42]

The majority's belief that if the authorizing resolution had been struck down there would have been no need for the pertinency discussion seems to have ignored a familiar rule: "Where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.' "[43] It has been suggested that the vagueness of the authorizing resolution could be cured by a statement from the Committee Chairman defining the delegated area of the Committee's jurisdiction. Perhaps, if this was done, it would fill in the gaps left open by the authorizing resolution. It would also save Congress from the difficult task of making the resolution specific and still giving the Committee enough latitude to probe into new problems as they arose.

V. Rights Under the First Amendment

The Committee, by attempting to compel Barenblatt to discuss his political associations and activities, has raised a fundamental question regarding the protection afforded by the First Amendment to the highly sensitive area of academic freedom. Barenblatt properly raised this objection before the Committee when he stated in his objections that, "under the First Amendment to the Constitution the power of investigation by Congress in matters invading freedom of speech and freedom of the press is limited."[44] And in view of this, "any investigations into my writings or speech communications is beyond the power of this Committee."[45]

There is no doubt that the First Amendment does apply to investigations:

[42] Barenblatt v. United States, 79 Sup. Ct. 1081, at 1099 (dissent) (1959).
[43] United States v. Title Ins. & Tire, 265 U.S. 472, 486 (1924). Accord, Union Pacific R.R. v. Mason Cty, 199 U.S. 160, 166 (1905).
[44] Record, p. 229-230.
[45] Record, p. 230.

> Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking.[46]

Since it is clear that a witness appearing before a committee has some safeguards derived from the First Amendment, it is essential that he should have some guide as to what they are. He must decide when he appears before a committee if he can justifiably invoke such a protection. If he is in error a criminal conviction is the result.

A "balancing test" was laid down by the Court for individual questions asked of witnesses:

> Where First Amendments rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.[47]

This test seems rather difficult to apply by a witness on the stand to whom a question has just been propounded.[48] But, if the purpose of the question has been fully disclosed, it would be possible to apply this test, and it would be very difficult to devise a more objective standard without unduly burdening the Committee.

While the "balancing test" sets the standard for individual questions asked of witnesses there remains the more fundamental question of what test is to be used in limiting committee's powers to investigate subjects which might infringe upon First Amendment rights. This question remains open as neither the *Barenblatt* or *Watkins* case dealt specifically with it, nor has any other case definitely answered the question.[49]

Some would narrow the area test to such a degree that if any information gathered by the investigation could conceivably result in valid legislation then the investigation is not prohibited. The trouble with this argument is it proves too much. Always some information gained would be of some relevance to potential legislation. This argument is drawn to its logical conclusion by permitting any First Amendment area to be invaded on the pretext that the resulting legislation contemplated by the Committee was a constitutional amendment.[50] To construe the area test in such a manner is to do away with it.

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[46] Watkins v. United States, 354 U.S. 178, at 197 (1957).
[47] Barenblatt v. United States, *supra,* note 42 at 1093.
[48] *Id.* at 1010, 1011 (dissenting opinion).
[49] The only decision where a congressional committee has been found to have abridged First Amendment rights is Rumely v. United States, 197 F. 2d 16 (D.C. Cir. 1952), *Aff'd* on other grounds, 345 U.S. 494, 501-502.
[50] An Australian case rejected just such a theory. Attorney General for the Commonwealth of Australia v. The Colonial Sugar Refining Co. (1914) A.C. 237 (P.C. 1913).

Another generally applied standard in this area is the test of clear and present danger. The often quoted statement of this test is that Congress would have the right to investigate conduct "of such a nature as to create a clear and present danger that it will bring about substantive evils that Congress has a right to prevent."[51] While the "clear and present danger" test would certainly guarantee the upholding of First Amendment rights, it has been urged that it should not be used for investigations as it would be impractical to wait for a clear and present danger before starting to investigate.[52]

The *Barsky* case suggests a standard of "reasonable cause for concern."[53] This test, as opposed to the standard allowing investigation into any area which could conceivably result in legislation, seems to prohibit committees from unnecessarily infringing on First Amendment rights. Neither would it be too restrictive on topics of investigation as would the "clear and present danger" test. The problem remains as to how the Committee is to inform itself as to when a "reasonable cause for concern" exists. The Committee should not go to the witnesses in the first instance. It would probably result in a "fishing expedition" if committees could question witnesses merely to discover if there were a "reasonable cause for concern." The problem of determining when a "cause for concern" exists can be dealt with in another way. In *Barsky* the dissent stated:

> The answer is through the Department of Justice, whose duty it is, if clear and present danger can be discovered, to enforce the law of 1940 which makes it a crime to advocate overthrow of the government by force; through any new agency that Congress may think it useful to create.[54]

VI. Problem and Solution

This writer feels that the Court would have been more logical if it had stayed with the Watkins philosophy. Even the *Watkins* decision, however, does not seem to be the answer to the problems of witnesses appearing before Congressional Committees. The House of Representatives could amend the authorizing resolution so as to make it more specific. And the members of the Committees, by making sure the individual witnesses were present when they disclose the purpose of the questions to be asked, could overcome the pertinency objection. The scope of the First Amendment objection needs to be clarified, but few would say it applied where Congress was investigating the advo-

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[51] Schenck v. United States, 249 U.S. 47, 52 (1919).
[52] Barsky v. United States, 167 F. 2d 241 (D.C. Cir. 1948).
[53] *Id.* at 246. See also United States v. Josephson, 165 F. 2d 82, 90, 91 (2d Cir. 1947), suggesting something less than a clear and present danger test.
[54] *Id.* at 259 (dissenting opinion).

cacy of the violent overthrow of our government, even in the delicate area of education.

An objection by the witness for any of the above grounds would not solve his central problem, public exposure. Even if successful, such objections would only result in the silence of the witness. And silence by a witness, in the public's eye, is not much better than an admission of guilt.[55] Often times the punishment imposed by the force of public opinion is as great as any court could inflict.[56]

It is this author's opinion that the best safeguard for a sincere witness is to allow him to make a statement in which he could explain any answers which might tend to incriminate him in the public's eye. The witness could then show the motives and surrounding circumstances of any associations or group memberships, and possibly explain, to the satisfaction of the public, his real innocence in these matters. If a witness is forced to give simple "yes" or "no" answers, the inferences which might be drawn by the public could be very unfair to him; whereas, if he could explain further, the answer might not seem nearly so incriminating.

To allow the safeguard suggested above would not "hamstring" the Committee as would many of the other suggested procedural reforms.[57] Several bills have been introduced in Congress which would require committees to allow witnesses to explain any answers given by them. They were not passed because of other detailed courtroom procedural

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[55] ". . . the chief aim, purpose, and practice of the House Un-American Activities Committee, as disclosed by its many reports, is to try witnesses and punish them because they are or have been Communists or *because they refuse to admit or deny* Communist affiliations. The punishment by humilation and public shame. . . ." Barenblatt v. United States, *supra,* note 42 at 1107 (dissenting opinion).

"Indeed, in the court of public opinion, the only court setting, the invocation of the Fifth Amendment, by the witnesses in such inquiries has in most cases, despite labored demonstrations that it ought not be so, been regarded as an admission of guilt, so the practical result of the invocation of the privilege had been negligible." Mayers, Shall We Amend The Fifth Amendment, at 132 (1959).

[56] "While the American people were fortunate to have this testimony, some of the witnesses themselves were not. Instances have come to the Committees attention where several of these witnesses have been forced from gainful employment after testifying. Some have been released from employment which they competently held for years prior to their testimony." H.R. Rep. No. 2516, 82d Cong., 2d Sess. 3.

Also see: United States v. Lovett, 328 U.S. 303 (1946).

[57] In 1949, a bill was introduced in Congress which allows witnesses in Congressional Committees, among other rights to: 1) file a sworn statement for the record, 2) testify personally in his own behalf, 3) require the Committee to produce up to 4 witnesses on his behalf, 4) examine such witnesses either by counsel or personally, 5) require the Committee to procure the appearance of adverse witnesses, and 6) cross examine adverse witnesses, either personally or by counsel. S. Cong. Res. 2, 81st Cong., 1st Sess., 95th Cong. Rec. 51 (Jan. 5, 1949).

Such extensive safeguards for witnesses would cause, not only the exposure of government sources, but also the lengthening of hearings to a burdensome degree.

safeguards contained in them.[58] A legislative committee is not a court and cannot effectively discharge its investigative and policy-making duties operating as a court, with pleadings, motions, and rules of evidence. But merely to allow the witness to make a complete statement would not seem to unduly burden the committees. Perhaps, if such a safeguard were made a part of the committee's procedure, such cases as *Barenblatt* and *Watkins* might never reach the courts.

IRVIN J. FRIEDLAND

[58] Footnote 57. Also see: H.R. 4564, 80th Cong., 1st Sess., (Nov. 24, 1947).